IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 535 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
BHARATHARI KASA FAKIR & 6 - Opponent(s)

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Appearance :
MR ND GOHIL, APP for Appellant(s) : 1,
MR JM PANCHAL for Opponent(s) : 1 - 7.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH
and
HONOURABLE MR.JUSTICE K.A.PUJ
Date : 24/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. This Appeal is against the order of acquittal recorded by the learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case

No.27 of 1985 whereby he has acquitted the accused persons from the charge of offences punishable under Sections 147, 148, 149, 302 read with Section 34 and also under Sections 323 and 504 of Indian Penal Code and also under Sections 37(1) read with Section-135 of Bombay Police Act. The State has preferred this Appeal making grievance against the order of acquittal mainly on the grounds mentioned in para-4 of the memo. Learned APP Mr.Gohil has taken us through the nature of grievance of the State.

2. We would like to state the basic contents of the prosecution case placed before the trial Court. It is alleged that on 27.3.1985 at 5 p.m this incident has occurred at village Paldi of Taluka – Vadgam. Prosecution witnesses as well as accused persons belong to the same community and they are related interse, as for example accused Nos.1 and 2 are in-laws of prosecution witnesses

Gata and Vishnu. As per the say of the prosecution on the prior day of incident accused No.2 Bai Kasu, wife of Kasa Fakir (accused No.1) had been to the house of the deceased to take her daughters for some social religious reason, but she was insulted and the daughters of the accused Nos.1 and 2 were not permitted to accompany Bai Kasu. On the next day a group of persons including accused Nos.1 and 2 had been to village Paldi so that they can take both the daughters and clarify the situation. It is the case of the prosecution that initially they had been to the house of accused No.6 Vana Kalu and from there at the request of complainant Mafa Badar they went to the house of prosecution witnesses and they had taken a cup of tea. It was requested that the members of the family of Gata as well as Vishnu were called, who were in their respective field so that they can negotiate and discuss on the relevant issue i.e for taking both the

daughters with them. They have thereafter gone to the house of accused No.7. Nothing is clarified by the prosecution that how the actual quarrel started and at whose instance the accused assaulted the deceased as well as his family members, but according to prosecution the accused persons formed an unlawful assembly and with an intention to assault the deceased and/or family members of the deceased, they started from the house of the accused No.7 with a weapon. Accused No.1 was, according to the prosecution, carrying an axe. Accused Nos.3 and 4 were holding knife. Accused Nos.5 and 7 had stick and accused No.6 had one Dhariya. The common object of the assembly was to commit murder of deceased Rajubhai Badarbhai and, therefore, they assaulted Rajubhai and real brother of deceased Rajubhai i.e. Mafabhai Badarbhai. Deceased Rajubhai was given various assaults but one that was given on head with Dhariya, as per say of the prosecution

proved fatal and he succumbed to the injury. The dead body of Rajubhai was lifted from the place of the incident to the residential house and, thereafter, a formal complaint came to be lodged. The real brother of the deceased, Mafabhai gave complaint and after investigating agency found that all the 7 accused persons are responsible for the assault made on Rajubhai as well as prosecution witnesses Nos.3, 7 and 9 and committed various offences and investigating agency charge-sheeted the accused persons for the above said offences.

3. After trial and appreciating documentary evidence led by the prosecution the learned Additional Sessions Judge acquitted the accused saying that the prosecution has failed in proving the charges beyond the reasonable doubt. The learned Trial Judge has considered the number of material improvements made by the prosecution

witnesses and contradiction emerging from the oral evidence led by them. The learned Trial Judge has also considered the aspect of certain improbabilities and infirmities left out by the investigating agency. According to the learned Trial Judge, the totality of the infirmity and lacuna emerging from documentary evidence led by the prosecution which is of such nature that it will be difficult for the Court to hold any one of the accused person guilty for wrong committed by them during the course of entire incident.

4. Of course, Mr.N.D.Gohil, learned APP, while placing the say of the State has submitted that at least the learned Trial Judge ought to have held accused No.3 – Bharthari Amrut Kasa guilty for the offences punishable either under Part-I and II of Section-304 of the Indian Penal Code, because the prosecution is consistent with regard to the fatal blow on left parietal region of the

person given by the accused No.3 – Bharthari Amrut Kasa and the learned Trial Judge could have ignored minor contradictions and improvements made by the prosecution witnesses so far as the case placed against the Bharthari Amrut Kasa is concerned. In response to the query raised by the Court Mr.Gohil, learned APP has said that the learned Trial Judge, even by acquitting the accused from the offences punishable under Sections 147, 148 and 149 could have held the accused guilty for the offenses punishable either under Section 34 or under Section 114 of the Indian Penal Code.

5.We have carefully gone through the contents of the FIR. That the first story is unfolded by the complainant before the police and the evidence is led by the witnesses whose names are reflected in the FIR. The learned Trial Judge has discussed the evidence of each

witnesses examined by the prosecution including two neighbours P.W. Nos.8 and 10. So far as oral evidence of P.W. No.10 is concerned, one important procedural infirmity has been pointed out to us by Mr.Panchal and there is enough strength in the submission of Mr.Panchal. It seems that the learned Trial Judge has appreciated the totality of the evidence given by these two witnesses who have been examined as independent witnesses. According to Mr.Panchal none of these two witnesses can be said to be an independent witnesses merely because these witnesses are found neighbours. While giving evidence modulating the theory by making some argument their conduct are also not found natural. The presence of P.W. No.8 actually at the spot of the incident was there or not also becomes doubtful, otherwise, he would have intervened into the incident, at least would have participated in taking dead

body of the injured – Rajubhai. Though his name is reflected in the FIR, the complainant Mafabhai has not referred the name of this witness in his deposition before the Court that he was present all through out the incident occurred. He has simply referred name of P.W. No.8 saying that he was sent to call Police Patel. This Police Patel is not examined by prosecution. It clearly appears from the evidence that this Police Patel who can be said to be an independent responsible citizen of the village could have unfolded the correct story before the police and before the Court. Three important eye witnesses i.e P.W. Nos.3, 7 and 9 are real brothers and till the date of trial the terms were enimical though there were metrimonial relations between the accused Nos.1, 2 and 3. So the evidence of these three eye witnesses is required to be scrutinized closely and we are satisfied that their

evidence has been closely scanned by the learned Trial Judge and is observed by the learned Trial Judge that it is risky to rely on the version of this witnesses. It is settled legal position that a particular witness or witnesses interested in the result of the prosecution make any modulation in the story or improvements in the basic version, then, it is not safe to rely on the evidence of such witness or witnesses and the learned Trial Judge, according to us has considered this basic principle of jurisdiction while discarding the evidence of these three injured witnesses. The Apex Court has said in more than one cases that the evidence of injured eye witnesses should not be rejected mechanically or only on the ground of having some minor contradiction. But in the present case it is rightly argued by Mr.Panchal that it is not possible to hold that P.W.No.3 Mafabhai is an

injured eye witness, because no formal injury certificate has been produced by prosecution. It appears that he was never sent for examination by investigating agency. He has not given description of nature of alleged injury sustained by him in his deposition nor he has stated anything in the complaint about the nature of injury sustained by him or a part of the body affected by such injury. It appears that none of these three eye witnesses were in the close area where the deceased – Rajubhai was assaulted, otherwise, out of these three real brothers one could have sustained some visible injury capable of medical examination. It is rightly argued that when it is the say of the prosecution that when the deceased Rajubhai was assaulted and attempt to save him was made, when the assailants were 7 in number, the persons who have attempted to save Rajubhai would not have saved themselves

from any injury of the weapon like Dhariya or Lathi. Clothes of witnesses claiming that they participated in lifting the dead body of Rajubhai from the spot of the incident to the residence have neither been recovered during the course of investigation nor they were sent for FSL, nor weapon including Dhariya sent for FSL for analysis. The place of recovery of Dhariya and knife is also doubtful because it emerges from the record that only one Dhariya has been used in the entire incident and it was found lying near the spot of the incident. In the same way, one knife was also recovered at the spot of incident. Even then the prosecution has attempted to say to the Court that the accused persons had voluntarily tendered weapon used in committing offence in the presence of panchas. Such a clear conflict cannot be ignored by any Court and the learned Trial Judge has rightly not ignored the same.

This cannot be said to be minor contradiction for causing improvements. Mr.Panchal has drawn our attention to the following material contraditions made by prosecution witnesses.

I. Contradictions :-

(A) In the complaint Ex.14/3, Mark-A, Mafa Badar P.W. 3, Ex.21 has stated that all the accused came with their respective weapons and surrounded the deceased, and thereafter started indiscriminate assault, thus there is an omnibus statement against all accused, which is first in time at the earliest opportunity. This would mean that fatal blow is given by A-6 Vana Kalu, who was allegedly armed with Dhariya. Whereas while giving deposition the complainant has not only tried to specify role of each accused, but also has attributed fatal blow to A-3 – Amrut Kasa.

Likewise, the complainant has not stated in complaint that A-1 Kasa Fakir gave an axe blow with its reverse side on right wrist of deceased; that A-5 Babu Mohan then inflicted a stick blow on shoulder; that A-7 Nathu Mohan gave blow by stick; that A-4 Baldev Dhula by throwing knife caught hold of deceased; that A-6 Vana Kalu gave Dhariya to A-3 Amrut Kasa and told that he would undergo sentence on his behalf; that A-3 inflicted Dhariya blow on head.

(B) Even how Dhariya came in the hands of A-3, three versions are coming on record. As per evidence of complainant A-6 offered it to A-3 by saying that he would undergo sentence on his behalf; as per the evidence of P.W.7, Ex.31 Vishnu Badar, A-6 simply handed it over to A-3, as per evidence of P.W. 9, Ex.40 Gata Badar A-3 snatched it away from A-6.

(C) As per the evidence of complainant A-4 by throwing knife caught hold of deceased. Whereas

as per evidence of P.W. 7 two accused persons i.e., A-4 as well as A-6 both caught hold of deceased.

(D) As per evidence of complainant A-4 by thorwing knife caught hold of deceased; whereas P.W. 7 admits in his cross that when A-4 caught hold of deceased at that time, he was holding knife in his hand.

II.Basic infirmities :-

(A) As per the evidence of complainant accused fled the place after offense by leaving behind two weapons viz, Knife and Dhariya. Whereas the very weapons were recovered at the instance of accused by drawing a panchnama.

(B) Though weapons are recovered at the instance of accused, not a single weapon is sent for chemical examination to FSL for analysis by police.

(C) Though the complainant has stated in his

evidence that after the incident he lifted his brother and as his brother was bleeding his clothes were stained with blood. Miserably the police has not even tried to seize blood stained clothes, nor had this witness produced those clothes before police.

While taking us from the oral evidence he has pointed out the following improbabilities.

III. Improbabilities :-

(A) It is an admitted fact that A-6 Nathu Mohan was aged about 70 years of age at the time of occurrence of offense. Now as per the evidence of complainant, in chief he has stated that after handing over Dhariya to A-3, A-6 caught hold of him and that is why he could not intervene. It is not possible that a man of 70 would be in such a physical state so as to have control on another man of 35 years.

(B) It does not sound probable that as to how deceased alone was made target of assault and all the accused straight way opened an assault on Raju-deceased, though there was no prior quarrel with him as per prosecution case.

(C) It is not believable that why the accused persons being 'Vevai' – guardians of the bride would put the lives of their own daughters in peril. They would not act in such a way by which their daughters' lives would be jeopardized. They would not go to this extreme level unless something has happened, so the origin and genesis of the occurrence is suppressed by the prosecution.

(D) Allegation of catching hold of deceased though levelled does not inspire any cofidence. Because when a person is caught hold of he would not be static / stationary, he would try to save himself from the blows and in that process he is bound to offer resistance and in such melee /

commotion the possibility of receiving injury by the person catching hold of cannot be safely excluded.

(E) Though P.W 7 in his cross deposed that when A-4 caught hold of deceased he was holding knife at the same time, does not appear to be probable. Because by holding a knife it is physically impossible to catch hold of a person.

(F) As per prosecution case complainant received injuries as accused beat him with fisticuffs. If this be so then accused would not have beaten him by fists since they were armed with weapons. Again no medical certificate is produced by the prosecution on record showing the injury on person of complainant.

(G) It is highly improbable that when the incident is witnessed by three persons who are none other than real brothers, they would not even try to save the life of their brother, who are not at a far distance. So their conduct also

renders their evidence doubtful.

According to Mr.Panchal these contradictions, infirmities and inconsistencies are important and they have been rightly appreciated by the learned Trial Judge.

6. When the say of the prosecution is that initially Dhariya was held by accused No.6 Bharthari Vana Kalu and in turn it was either given to accused No.3 or it was taken by accused No.3 or snatched by the accused No.3, such an important event must be reflected in the FIR when it has been lodged after consultation with Police Patel. This improvement cannot be said to be an insignificant improvement. Omission made by the witnesses have been considered as contradiction at the time of appreciating the evidence of that particular witness. In the same way, the improvements made by the witnesses with a view to create either corroboration or to give strength

to the story of the prosecution is viewed seriously by the Criminal Court and in this background, the settled legal position, above referred contradictions, improvements and improbabilities pointed out by Mr.Panchal take us to a conclusion that the learned Trial Judge was right in saying that the prosecution has remained unsuccessful in proving the guilt of the accused.

7. We would like to comment on certain aspects that the say of the prosecution is found improbable when it says that a 70 years old man i.e accused No.6 was capable of holding the present prosecution witness who was only 35 years of age on the date of the incident. In the same way, it is not possible for us to accept the say of the prosecution that none of the real brothers of the deceased sustained injuries because they were not capable to intervene in the entire incident of assault on Rajubhai and because they

were either prevented physically or otherwise, especially when they were there at the spot of incident.

8. The prosecuting agency, according to us, ought not to have charge-sheeted the accused persons for the offences punishable under Sections 147, 148 and 149 of the Indian Penal Code. It is true that a group of persons can form an unlawful assembly in couple of minutes or a decent crowd can convert itself into an unlawful assembly in a very short spell of time. In the present case the prosecution was not able to give evidence as to why these close relatives who had been there at village Paldi to take their daughters for socio-religious purpose would constitute an unlawful assembly and assault the real brother of their son-in-law for petty reason of some family dispute. At no point of time there was hot discussion, otherwise the

prosecution ought to have unfolded the story. No convincing reason is emerging as to why accused Rajubhai was dragged and why the reason of crime has been suppressed. For short, according to us, the finding recorded by the learned Trial Judge is not required to be disturbed. It is settled legal position that the jurisdiction of Court dealing with the appeal against any order of acquittal is limited. Unless it is possible to say that the finding of the lower Court is abundantly illegal or perverse, the order of acquittal should not be disturbed. It is said by the Apex Court that merely other view was possible, the appellate Court should not try to assume the role of trial Court in holding the accused guilty by magnifying their other views.

9.The reasons recorded by the learned Judge are logical and there is no element of perversity or patent illegality. The Apex Court in a

decision in the case of **Dwarkadas vs. State of Haryana, reported in (2002) 1 SCC 204**, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is possible. In the same way, the observations of the Apex Court in the case of **Kanshiram v. State of Madhya Pradesh (Re.Para-21), reported in AIR 2001 SC 2902**, in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal unless the order is absolutely illegal and perverse. In view of the ratio of the above cited decision, there is no merit in the present Revision Application and the same is required to be dismissed.

10.As per the settled legal position, the Revision Application filed by a private party or at the instance of the informant against the order of acquittal should be entertained in a narrow compass and the Court must question itself while exercising revisional jurisdiction and while dealing with such Revision Applications. In the case of **Bindeshwari Prasad and others v. State of Bihar, reported in AIR 2002 SC 2907**, the Apex Court observed that it has repeatedly been held that the High Court should not reappreciate the evidence to reach to a finding different from the trial Court in absence of manifest illegality resulting into great miscarriage of justice exercise of revisonal jurisdiction in such cases is not warranted. It is further observed that at the best the High Court thought that the prosecution witnesses were reliable while the trial Court took an opposite view.

11.In the case of **State of Kerala v. Nazar, reported in (2006) 1 Supreme Court Cases (Cri) 732**, the Apex Court observed that so far as PW 1 is concerned, there was a simple injury on his back of a very insignificant nature. PW 1 is also the first informant, but while lodging the first information report, he had stated that he had suffered a scratch on his back at the hands of some unknown persons. In his deposition, he admitted that he knew A-2 from before. It was found that he had not named A-2 as his assailant nor had he named him at all in the first information report. The High Court taking all these facts and circumstances to the conclusion that the prosecution had not made out a case against A-2 and the other accused persons, who were appellants before the High Court. The Court came to the conclusion that the conclusion reached by the High Court is

based on the evidence on record and Court find no error in the appreciation of the evidence by the High Court. (**The High Court has taken a view which could reasonably be taken on the basis of the evidence on record. The conclusion reached by the High Court appears to be reasonable.** In such circumstances, it would not be proper for this Court to interfere with the order of acquittal recorded by the High Court. Even if another view may be possible the order of acquittal must be sustained, if the finding of the High Court is a finding based on the evidence on record and is a possible reasonable view of the evidence.

12. With the above observations we dismiss Criminal Appeal No.535 of 1986.

(C. K. BUCH, J.) (K. A. PUJ, J.)

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